Supreme Court, U. S.
FILED
DEC 28 1977
MICHAEL RODAK, JR., CLERK

No. 77-928

IN THE

Supreme Court of the United States

October Term, 1977

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL.,
Petitioners,

v.

NATIONAL REJECTORS INDUSTRIES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BERNARD KLEIMAN
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

JAMES E. YOUNGDAHL
KENNETH L. SCHORR
Youngdahl, Larrison & Agee
2101 Main Street
Post Office Box 6030
Little Rock, Arkansas 72216

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
JEREMIAH A. COLLINS
Bredhoff, Gottesman, Cohen & Weinberg
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

CARL B. FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

Attorneys for Petitioners

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	23

Appendices:

A. Opinion of the Court of Appeals, August 30, 1977	1
B. Opinion of the District Court, April 16, 1977	21
C. Order Extending Time to File Petition for Writ of Certiorari, November 21, 1977	30

TABLE OF AUTHORITIES

Cases

Anheuser-Busch, Inc. v. Teamsters Local 633, 511 F.2d 1097 (1st Cir.), *cert. denied*, 423 U.S. 875 (1975)	8, 9, 15-16
Arlan's Department Store, 133 NLRB 802, 807 (1961)	19
Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970)	*passim*
Buffalo Forge Co. v. Steelworkers, 428 U.S. 397 (1976)	*passim*

Cincinnati Penthouse Club, 168 NLRB 969 (1967) 19

Far East Conference v. United States,
342 U.S. 570, 574-75 21

Gateway Coal Co. v. United Mine Workers,
414 U.S. 368 (1974) 20

Mastro Plastics v. NLRB, 350 U.S. 270 (1956) .... *passim*

Nader v. Allegheny Airlines, 426 U.S. 290, 303-04 (1976) 21

NLRB v. C&C Plywood Corp., 385 U.S. 421 (1967) 22

Pilot Freight Carriers, Inc., 224 NLRB 342 (1976) 19

Sinclair Refining Co. v. Atkinson,
370 U.S. 195, 225 (1962) 11

Miscellaneous

BNA, Labor Relations Cumulative Digest and Index .. 22

Comment, Dow Chemical: Restricting the Availability of Self-Help Measures in Labor Disputes, 77 Colum. L. Rev. 105 (1977) 19

Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958) 19

Note, The Unfair Labor Practice Strike,
46 NYU L. Rev. 988 (1971) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL NO. 6178, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; FRANKIE JOE RUSSELL; CLOIS D. LISHBROOK; MARGARET SUE LOUDERMILL; and DEWEY D. STILLES, *Petitioners*,

v.

NATIONAL RETECTORS INDUSTRIES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on August 30, 1977.

OPINIONS BELOW

The opinion of the court of appeals is reported at 562 F.2d 1069 and is reprinted here as Appendix A. The district court's opinion is not officially reported, but appears at 95 LRRM 2145; it is reprinted here as Appendix B.

JURISDICTION

The Court of Appeals' opinion issued on August 30, 1977.

On November 21, 1977, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including December 28, 1977 (Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the "narrow" exception to the Norris-LaGuardia Act prohibition of labor injunctions, recognized in *Boys Markets* v. *Retail Clerks Union*, allow a court to enjoin concerted activity over an arbitrable issue where that concerted activity is not such as would interfere with the arbitration process in any respect?

2. May a federal court, pursuant to *Boys Markets*, enjoin employee concerted activity which in the court's own view "may well" have been a response to employer unfair labor practices, where, if the concerted activity had been a protest against unfair labor practices, it would not have been a breach of contract under *Mastro Plastics Corp.* v. *NLRB*?

STATUTORY PROVISIONS INVOLVED

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides in pertinent part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title
>
> ...
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...
>
> ...
>
> (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE

The respondent, National Rejectors Industries (NRI), operates a plant in Hot Springs, Arkansas where coin and currency handling equipment is manufactured and assembled. NRI employs some 300 production and maintenance employees at the plant. Since 1961, petitioners United Steelworkers of America (USWA) and its Local 6178 have been the exclusive bargaining representatives of these employees.

On December 15, 1976, NRI suspended the employment of the vice-president and recording secretary of Local 6178, allegedly because of an "incident" it said had occurred at a meeting between management and the grievance committe of Local 6178. Five days later, on December 20, 1976, NRI discharged the president of Local 6178, effective December 15, 1976, allegedly for his part in the same "incident."[1] The local filed grievances with respect to the sus-

[1]This is the third time the employer has attempted to discharge the president; on the two previous occasions arbitrators ordered him reinstated.

pensions and the discharge.

Under the collective bargaining agreement, grievances are to be resolved by a four-step procedure. The first step calls for a meeting between the foreman and the grievant, after which the foreman is to answer the grievance. If the grievant is dissatisfied with the answer, a Step 2 meeting is held between the local union grievance committee and designated management representatives. In Step 3, representatives of the "National Organization of the Union" (the USWA) and of the "executives of the Company" are involved; in Step 4, the dispute is submitted to binding arbitration.

The grievances concerning the suspensions and discharge never reached arbitration, or even Step 3. For on December 17, 1976 the Company announced its unwillingness to meet in Step 2 with the grievance committee to discuss these grievances—or any others then pending—so long as the president of the local remained a committee member. After efforts to resolve this dispute failed, the local filed a grievance complaining of NRI's refusal to comply with the grievance-arbitration procedure.[2] The local also filed an unfair

[2] The grievance centered on the validity of NRI's claim that its refusal to meet with the president of the local was authorized by Article XV, § 4 of the collective bargaining agreement, which provides:

> Should the actions of the representatives of either party be such that the integrity of the grievance procedure is threatened, then the authorized 3rd step representative of the Company or Union shall notify the opposite party who shall investigate and report back the results of such investigation and the corrective action taken, if any. If such report is not satisfactory or if the facts are in dispute either party may request a meeting for the purpose of determining the facts and settling the issue. If the issue is not satisfactorily settled at this meeting either party may request the other to take such action as may be appropriate and necessary to correct the problem. In this event, the grievance machinery shall continue to function with the next highest officials of the Company and Union conducting the meetings to insure the processing of grievances in a timely manner until such time as both parties are agreed that normal operation of the grievance procedures can be resumed.

NRI takes the position that this section permits it to refuse to meet with the grievance committee so long as the union president is a member; the union disagrees. The only explanation in the record as to the basis of NRI's objection to the local president's participation is that NRI believes it is "futile" to meet with him.

labor practice charge with the National Labor Relations Board ("NLRB") alleging that the suspensions and discharge of the local's officers were discriminatory in violation of § 8(a)(3) of the National Labor Relations Act ("NLRA"), and that NRI's refusal to process the grievances breached the duty to bargain in good faith imposed by § 8(a)(5). NRI filed a cross-charge, alleging that the local's refusal to appoint a replacement for its president breached its duty to bargain in good faith as required by § 8(b)(3).

Processing of the contract grievances deadlocked because of the company's refusal to meet with the local's president as part of the grievance committee. Investigation of the NLRB charge went forward, however, and on February 18, 1977 the NLRB's Regional Director informed NRI that he had decided to issue a complaint against the company attacking the suspensions and discharge as violative of Section 8(a)(3) and the refusal to meet with the local's grievance committee as violative of Section 8(a)(5); and that he had decided that further proceedings on NRI's cross-charge were not warranted, as the unions' conduct did not constitute a refusal to bargain violative of the Act.

Four days later—on the same day that the Regional Director's complaint was formally issued—NRI informed the local of its intent to adopt six new work rules, including one requiring all employees "to log into and out of their departments" whenever they left their departments for any reason, even to go to the bathroom. The company refused to meet with the local to discuss the work rules so long as the local president attended. Consequently, several weeks later

the rules were formally promulgated without ever having been the subject of negotiations. The local filed a grievance alleging that the unilateral adoption of the work rules violated the collective bargaining agreement, and an unfair labor practice charge alleging that NRI's conduct was a refusal to bargain violative of § 8(a)(5). (The NLRB's Regional Director later issued a complaint on this charge and consolidated it with the earlier-issued complaint.)[3]

During the first three days of the enforcement of the new rules, 138 employees were suspended by the company for refusing to "log in and out." As a result of these suspensions, production at the plant dropped by 70%. The local filed grievances challenging these suspensions. On March 18, 1977, NRI offered to stop enforcing the "logging" rule if USWA would agree to submit the pending grievances directly to arbitration (i.e. if the union would agree to bypass the pre-arbitration steps, thus waiving its right to consideration of the grievances by a committee which included the local's president). When USWA declined to bypass the contractually prescribed grievance steps, NRI filed this action under § 301(a) of the Labor-Management Relations Act of 1947. In its complaint NRI alleged, in essence, that petitioners had encouraged noncompliance with the new work rules and by so doing had breached Article XXXIV of the collective bargaining agreement which provides that "there shall be no strikes, slowups, stoppages of work, sit-down strikes, refusals to handle merchandise, material or equipment or other interference with the operation of the Company during the term of this Agreement." The complaint prayed for injunctive relief and damages.

On March 30, 1977 the district court, after holding a hearing, issued an injunction requiring, *inter alia,* that the em-

[3] This new complaint was issued while this case was in the court of appeals. The court was informed of its issuance by an affidavit from counsel, attaching the amended complaint.

ployees log in and out in accordance with the company's newly-promulgated work rule. In its opinion the court explained that the "requirements of *Boys Markets, Inc.* v. *Retail Clerks,* 398 U.S. 235 (1970) . . . have been met, and the injunctive relief prayed for should be granted." App. at 28.

Petitioners appealed to the United States Court of Appeals for the Eighth Circuit. An "administrative panel" of that court stayed the district court's injunction and ordered the briefing expedited. On June 17, 1977, another division of that court, after hearing oral argument, dissolved the stay by a 2-1 vote. In its subsequently issued opinion, the panel majority "agree[d] with the district court that the employees violated the work rules in order to incur suspensions for the purpose of disrupting operations at the plant, and that this activity violated the provisions of Article XXXIV of the collective-bargaining agreement [forbidding, *inter alia,* any "interference with the operations of the Company"]. App. at 11-12. The majority further found that "the violations of the work rules and consequent suspensions resulted from a dispute between the parties" over matters which were arbitrable. *Id.* at 12-13. Having thus concluded that the refusals to log in and out were in breach of contract, that they were "over" arbitrable disputes, and that no other considerations militated against issuance of an injunction, the majority ruled that the case met the literal requirements enunciated in *Boys Markets* for issuance of an injunction notwithstanding the anti-injunction strictures of the Norris-LaGuardia Act.

For purposes of considering the issues presented in this petition, two features of the majority's opinion should be emphasized:

(1) The majority did *not* find (nor had the district court) that the employees' refusals to log in and out interfered with the company's production but only that the suspen-

pensions which were visited for this conduct resulted in such interference. Indeed, the evidence was clear that the refusals to log in and out could *not* have interfered with production (see *infra,* p. 14). Thus, there was no finding in either lower court that the refusals to log in and out exerted pressure upon the company to yield on the pending disputes without securing an arbitrator's decision, nor that they threatened the arbitration process in any other way.

(2) The majority recognized, but did not decide, petitioners' claim that the employees' refusal to log in and out was a response to unfair labor practices committed by the company. The majority acknowledged that "[t]his may well be true," but declared:

> "We do not in this case consider the merits of the company's actions; we consider only whether the union's *reactions* created a dispute which the parties had obligated themselves to resolve through arbitration under the collective-bargaining agreement" (emphasis in original). App. at 7 n.8.

Judge Lay dissented, declaring that the "majority opinion misconstrues the limited incursion into the Norris-LaGuardia Act . . . authorized by *Boys Markets* . . ." App. at 16. He reasoned, *inter alia,* that the employees' conduct did not in any way threaten the arbitral process (*id.* at 18-19); that accordingly the injunction contravened the Norris-LaGuardia Act as construed in *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397 (1976) (*id*); and that the company's harm was self-inflicted, caused by its own decision to suspend employees for non-disruptive conduct, and thus unworthy of federal injunctive protection. Judge Lay further declared, (*id.* at 19-20), that the majority's decision was in direct conflict with that of the First Circuit in *Anheuser-Busch, Inc.* v. *Teamsters Local No. 633,* 511 F.2d 1097 (1st Cir. 1975), *cert. denied,* 423 U.S. 875 (1975).

REASONS FOR GRANTING THE WRIT

Introduction

This case presents important issues which have not been but should be decided by this Court, with respect to the authority of federal courts to enjoin concerted employee activity:

(1) May a federal court enjoin concerted action "over" an arbitrable dispute where the concerted action does not threaten the arbitral process in any way? As we show in Part I below, in *Boys Markets* and again in *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397 (1976), this Court recognized a "narrow" exception to the Norris-LaGuardia Act's anti-injunction command in order to accommodate the policy of the Labor-Management Relations Act of 1947 ("LMRA") of encouraging and protecting agreed-upon arbitration processes as means to resolve contractual disputes. This Court ruled that a strike in breach of contract may be enjoined where it is "over" an arbitrable dispute and thus would "interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute." 428 U.S. at 407. A *strike* in breach of contract designed to effect a resolution of a dispute the parties had agreed to arbitrate inevitably has such a deleterious effect on arbitration. But not all concerted activity will have this effect, and implicit in the rationale of *Boys Markets* and in *Buffalo Forge,* is that other types of employee concerted action which do *not* "interfere with [or] frustrate the arbitral processes" may not, consistent with Norris-LaGuardia, be enjoined, even though such action may be in breach of contract and "over" an arbitrable dispute. Without a threat to the arbitral processes, there is no conflict between Norris-LaGuardia and the LMRA that would justify an "exception" to the former statute. The First Circuit, in *Anheuser-Busch, Inc.* v. *Teamsters Local 633,* 511 F.2d 1097 *cert. denied,* 423 U.S. 875 (1975) has made express the implicit requirement of *Boys Market* and *Buffalo Forge* that

the concerted action must be such as to threaten the arbitral process. The court below disagreed. It is important that this Court resolve that conflict and explicitly state a test that will, consistent with the rationale of *Boys Markets* and *Buffalo Forge*, not permit unwarranted incursions on the Norris-LaGuardia Act.

(2) This case presents an important question as to the interplay between two distinct elements of national labor policy recognized in decisions of this Court: on the one hand, the principle of *Boys Markets* that breaches of contract may be enjoined when they threaten the arbitral process; and on the other, the principle of *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956), that a strike or other concerted employee action in response to an employer unfair labor practice is not a breach of a union's contractual "no-strike" obligation absent express contract language making that obligation applicable to protests against unfair labor practices. When an employer seeks a *Boys Markets* injunction against union concerted action, and the union counters that its action is in response to an employer unfair labor practice and thus not in breach of contract, how are the principles of *Boys Markets* and *Mastro Plastics* to be reconciled? The response of the court below was that *Boys Markets* injunctions, if otherwise warranted, should be issued without any consideration of the union's claim that the concerted employee action to be enjoined is being taken in response to an employer unfair labor practice. But, as we show in Part II below, this would mean that courts would be enjoining concerted activity which may be perfectly proper—the core evil the Norris-LaGuardia Act was designed to prevent. Given the freqency of concerted responses to employer unfair labor practices, it is essential that this Court articulate the standards which apply when an employer's invocation of *Boys Markets* collides with a union's invocation of *Mastro Plastics*.

I

In *Boys Markets*, this Court created a "narrow" exception, 398 U.S. at 255, to the Norris-LaGuardia Act's general prohibition of injunctions in labor disputes. That exception was grounded wholly on the need to accommodate the prohibition of Norris-LaGuardia with the policy of the LMRA favoring agreed upon arbitration processes as a means to resolve contractual disputes. This purpose is clear in (i) the *Boys Markets* decision itself; (ii) its parent, the dissenting opinion in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962); and (iii) its offspring, *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397 (1976). In *Sinclair* the dissenters agreed with the majority that the Norris-LaGuardia Act precludes courts from enjoining concerted activities simply because those activities are "breaches of private contracts." 370 U.S. at 275. The dissenters argued, however, that Congress' later adoption of legislation designed to foster voluntary arbitration as the means for resolving contract disputes created on "additional public policy" which would be "threatened" in certain circumstances were injunctions not available to protect the arbitral process, and thus that Norris-LaGuardia had to be "accommodated" to this later legislation. *Id.* In *Boys Markets*, the Court adopted the *Sinclair* dissenters' views and created the "narrow" exception to Norris-LaGuardia anti-injunction command to implement "the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes," 398 U.S. at 253. Thus, under *Boys Markets*, a party who has agreed to submit disputes to arbitration and then, in breach of contract, resorts to economic force to coerce the other side to concede on the issue before it reaches the arbitrator can be enjoined from so doing in order to protect the arbitral forum. In such circumstances, as this Court put it in *Buffalo Forge*, "injunctions pending arbitration are *essential* to carry out promises to arbitrate" 428 U.S. at 411 (emphasis added).

But absent such "necessity," *id.* at 412, injunctions are not permitted; as the *Buffalo Forge* Court explained:

> The driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties. Only to that extent was it held necessary to accommodate § 4 of the Norris-LaGuardia Act to § 301 of the Labor-Management Relations Act and to lift the former's ban against the issuance of injunctions in labor disputes. Striking over an arbitrable dispute would interfere with and frustrate the arbitral processes by which the parties had chosen to settle.
> • • •
> Section 301 . . . assigns a major role to the courts in enforcing collective bargaining agreements, but aside from the enforcement of the arbitration provisions permitted by *Boys Markets*, the Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris-LaGuardia Act. *Id.* at 407, 409.

Although the rationale of the *Boys Markets* exception to Norris-LaGuardia is to protect the arbitral process, the court below articulated the applicable standard for issuing *Boys Markets* injunctions in a manner that would allow injunctions to issue absent any threat to arbitration. It stated:

> [W]e conclude that *Boys Markets* and later cases authorize the issuance of an injunction when (1) the union is engaged in a strike or other violation of a "no strike" clause of a collective-bargaining agreement, if (2) the violation was precipitated by a dispute between the parties, which dispute is (3) subject to mandatory grievance or arbitration procedures provided for in the agreement, and (4) issuance of the injunction is otherwise warranted under ordinary principles of equity. App. at 10.

That statement is true to the literal language of *Boys Markets*. But it omits an additional element implicit in and critical to the decision's rationale: to come within the *Boys Markets* exception the concerted conduct sought to be enjoined must be of a nature that "would interfere with and frustrate the arbitral processes." *Buffalo Forge, supra,* 428 U.S. at 407.

In *Boys Markets* itself it was not necessary for the Court to make this additional element explicit, since in the fact pattern involved there this element was necessarily satisfied by proof of the other elements. The concerted activity sought to be enjoined in *Boys Markets* was a strike, which, by its very nature, was designed to disrupt production and thereby exert pressure on the employer to yield to the union's position on the underlying dispute instead of awaiting the arbitrator's decision for which the parties had contracted. Thus, proof that a strike in breach of contract is occurring over an arbitrable dispute necessarily establishes that the arbitral process is being "interfere[d] with and frustrate[d]."

But no law of nature dictates that employees can manifest dissatisfaction with their employer's conduct only by striking. Other alternatives are available which may violate the contract but do not jeopardize production and hence do not threaten the arbitral process. In particular, as here, employees may manifest their disapproval of work rules promulgated by their employer by disobeying those rules, without in any way threatening the availability of the arbitral forum as the final means for resolving whether the rules were properly promulgated. Such disobedience of work rules can constitute a breach of contract. But plainly work rules come in all varieties, from the trivial to the vital, and not every such breach—or every concerted such breach—will threaten the arbitral process. In such cases, proof of the implicit element of *Boys Markets*—that the violation "interfere[s] with and frustrate[s]" arbitration—is necessary to assure that the Norris-LaGuardia Act is not violated without any countervailing furtherance of the policies of the LMRA.

The instant case illustrates the point perfectly. The

courts below did not find—nor could they have found—that the injunction was "essential" to avoid frustrating the arbitral process. The conduct that was enjoined, violations of the work rule requiring employees to log in and out, posed no threat of coercing the company to concede on the arbitrable issues, because the violations in no way impaired production; the very fact that until March 14, 1977 NRI had never had a "logging" rule and that four days after adopting the rule NRI offered to suspend its enforcement establishes that compliance with the rule was in no way necessary to production.[4] Production was slowed solely because of NRI's self-destructive response to the concerted activity—mass suspensions—not by the activity itself. Yet the courts below, by applying the language of *Boys Markets* literally and formalistically and ignoring the implicit element of the *Boys Markets* test, held the violations enjoinable simply because they occurred "over" an arbitrable dispute.

---

[4] The court below found that petitioners had violated the work rule with the intent to "incur suspensions" and that for that reason their conduct violated the section of the collective bargaining agreement prohibiting "other interference[s] with the operations of the Company." App. at 11-12. By so holding, the court effectively construed this language as constituting a promise to refrain from disobeying work rules in an effort to provoke suspensions. But whatever the merits of this holding as a matter of contract interpretation, it has no bearing on the critical *Boys Markets* issue whether the breach of contract threatens the arbitral process. On that issue, as we show in text, the evidence is undisputed: the breach had no such effect.

Indeed, on this record, the only conduct that can be said to have threatened arbitration was NRI's actions in suspending persons violating the work rules. The effect of his behavior was to exert economic pressure on petitioners to concede on an important arbitrable issue: *viz*, whether NRI could refuse to process grievances so long as the local president was a member of the grievance committee. That this was indeed the Company's purpose was revealed when four days after promulgating the work rules the company offered to cease enforcing them if USWA would concede on this issue.

In adopting this interpretation, the Eighth Circuit rendered a decision that cannot be squared with the First Circuit's decision in *Anheuser-Busch, Inc.* v. *Teamsters Local 633*, 511 F.2d 1097, *cert. denied*, 423 U.S. 875 (1975). In *Anheuser-Busch* the employer promulgated a rule prohibiting employees from wearing tank top (sleeveless) shirts. Within a few days all but a handful of employees in two departments had been suspended for violating the rule, and production was halted. The employer sought an injunction against further violations of the rule, contending that the employees were engaged in a "concerted interference with brewery operations" for the purpose of manifesting their objection to employer conduct which was arbitrable, *i.e.*, the adoption of the rule. *Id.* at 1100. The violation, then, was "over" an arbitrable dispute. Yet the court of appeals reversed the district court's decision granting relief, holding that "the limited incursion upon the Norris-LaGuardia Act which was authorized by *Boys Markets* is insufficient to support the injunction issued below." *Id.* at 1099. In his opinion for the court, Chief Judge Coffin articulated the holding in terms of the absence of "irreparable injury"—the fourth *Boys Markets* requirement in the Eighth Circuit's formulation—reasoning that "an employer cannot be permitted to qualify for injunctive relief simply by responding to minor employee infractions in a way that brings serious and irreparable damage upon himself by causing a shutdown." *Id.* But to say that the injury inflicted by violation of the work rule was not itself "irreparable" is simply another way of saying that to obtain an injunction an employer must prove that it has suffered a certain type of injury—economic loss which places pressure upon the employer to surrender its position short of arbitration and thus "interfere[s] with and frustrate[s]" the arbitral processes. That is, indeed, the point Judge Coffin made in the penultimate paragraph of his opinion:

> Here . . . there has been on the employer's part nothing more than the undifferentiated claim that there exists

> a right to make and enforce rules pending the outcome of a grievance and arbitration procedure, and we reject the contention that the labor injunction is available in the ordinary course of events as an enforcement mechanism. *Id.* at 1100.

The court below strove mightily to distinguish *Anheuser-Busch* away. It reasoned that "the injury to NRI threatened by continued disruptions of employees . . . is clearly greater than the potential harm of having one's employees present an unsightly appearance to visitors at the plant." App. at 15.[5] We doubt that this is so. But even assuming *arguendo* that it were, the court below still would have missed the point. Every breach of contract probably visits some quantum of harm, but that does not justify a departure from Norris-LaGuardia. The determinative question is whether the breach "interfere[s] with and frustrate[s] the arbitral processes by which the parties have chosen to settle the dispute." The court below made no finding that the harm here—not having employees log out before, *inter alia*, going to the bathroom—is sufficient to threaten to coerce the employer to concede the arbitrable issues. Thus the factual distinction which the court below attempted to draw ignores the point of *Anheuser-Busch*, and so is ultimately irrelevant.

The decision below threatens the very integrity of the Norris-LaGuardia Act by permitting an injunction to issue where the countervailing policy of the LMRA is not implicated. To protect the Act's integrity, it is necessary for the

[5] The court also stated that, "Here, NRI did not bring about the disruption itself by insisting upon enforcement of minor work rules. The company was willing to, and did in fact suspend enforcement of its rules pending resolution of the underlying dispute through arbitration." App. at 15. It is not clear to us how it can be said that "NRI did not bring about the disruption itself"; the record on this point is undisputable to the contrary. And the company's willingness to "suspend enforcement" proves our point, not the contrary, for it shows that the rules were sufficiently unimportant that their breach did not threaten to frustrate the arbitration process.

Court to restrict the *Boys Markets* exception to a scope justified by its rationale by making explicit the implicit requirement that only those contract violations that "frustrate" the arbitral process can be enjoined. For this reason—and to resolve the conflict between the circuits—the Court should grant a writ of certiorari.

II

This case also presents an important question as to the interplay between two distinct elements of national labor policy recognized in decisions of this Court: (1) the principle of *Boys Markets* that concerted activity *in breach of a collective bargaining contract* may be enjoined when it threatens the arbitral process; and (2) the principle of *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956) that absent express language (not present here), a contractual "no strike" clause will be construed such that concerted action in response to employer *unfair labor practices* will not be considered a breach of the clause. The concerted activity which the court below enjoined was in response to conduct by NRI which not only may have contravened the collective bargaining agreement but also may have violated the National Labor Relations Act. Petitioners so believed, and sought to establish the correctness of their belief by filing unfair labor practice charges with the NLRB. The Regional Director, after investigating the charges, decided that they were meritorious and hence issued a complaint. And the court below stated that petitioner's assertion that NRI had committed multiple violations of the NLRA "may well be true." App. at 7. Necessarily, then, this case requires the Court to consider the applicability of *Boys Markets* to concerted activity undertaken in response to employer conduct that, albeit creating an arbitrable dispute, is also at least arguably an unfair labor practice.

This Court has never been called upon to apply *Boys Markets* in this context; the cases to date in this Court have involved strikes which were not alleged to be over employer

unfair labor practices. Automatic application of *Boys Markets* in this context would collide with *Mastro Plastice Corp.*, a decision the court below totally ignored. In *Mastro Plastics* the employer sought to discharge employees who had struck against the employer's unfair labor practice. The employer argued that the employees had waived their statutory right to strike by agreeing to a collective bargaining agreement containing an unqualified pledge that there would be no strikes during the term of the agreement. This Court disagreed, holding that absent an explicit provision barring unfair labor practice strikes, "no strike" clauses should not be construed to forbid such strikes. This Court explained that the "natural" construction of no strike clauses in collective bargaining agreements is that the union has promised not to strike over "contractual" matters, but has not waived the employees' right to strike in response to employer violations of law:

> We believe that the contract, taken as a whole, deals solely with the economic relationship between the employers and their employees. It is a typical collective bargaining contract dealing with terms of employment and the normal operations of the plant. It is for one year and assumes the existence of a lawfully designated bargaining representative. Its strike and lockout clauses are natural adjuncts of an operating policy aimed at avoiding interruptions of production prompted by efforts to change existing economic relationships. The main function of arbitration under the contract is to provide a mechanism for avoiding similar stoppages due to disputes over the meaning and application of the various contractual provisions.
>
> To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union. Whatever may be said of the legality of such a waiver when explicitly stated, there is no adequate basis for implying its existence without a more compelling expression of it than appears in . . . the contract. 350 U.S. at 281-38.

Mastro Plastics establishes that if the employer's conduct here constitutes an unfair labor practice,[6] then the union's concerted activity in response did not violate the collective bargaining agreement.[7] And since, under *Boys Markets*, only conduct in breach of contract, can be enjoined, it necessarily follows that if the employer violated the NLRA, the injunction against the union was improper. Such an injunc-

---

[6] In *Arlan's Department Store*, 133 NLRB 802, 807 (1961), the Board attempted to limit *Mastro Plastics* to "strikes in protest against *serious* unfair labor practices." (emphasis added). In our view—and the view of the commentators, *e.g.*, Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958); Comment, *Dow Chemical: Restricting the Availability of Self-Help Measures in Labor Disputes*, 77 Colum. L. Rev. 105 (1977)—this interpretation of *Mastro Plastics* cannot be squared with either its language or its reasoning. This Court has never had occasion to consider the correctness of *Arlan's Department Store*. The issue need not be addressed here, however, because it is clear that NRI's conduct—discharging the local union president and suspending two officers, refusing to meet with union representatives if the president was included, and finally unilaterally adopting new work rules—would constitute a serious violation. *E.g. Pilot Freight Carriers, Inc.*, 224 NLRB 342 (1976) (unlawful discharge and refusal to bargain); *Cincinnati Penthouse Club*, 168 NLRB 969 (1967) (discharge of single employee). The decision below did not turn upon a finding that the unfair labor practices here were "nonserious." On the contrary, the court below declared that the existence of unfair labor practices were irrelevant to its decision.

[7] The no-strike clause here, quoted at p. 6 *supra*, is virtually identical to the clause involved in *Mastro Plastics* which provided that:

> 5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain from engaging in any strike or work stoppage during the term of this agreement. 350 U.S. at 281.

Like the *Mastro Plastics* clause, the contract provision here is entirely general and makes no reference to unfair labor practice strikes; as in *Mastro Plastics*, the clause here is part of a contract regulating economic relations between the parties and providing for arbitration of contract disputes.

tion, against concerted activity which, by hypothesis, is perfectly proper, is the core evil which Norris-LaGuardia was intended to prevent. This Court has never left room for such injunctive exercise; that is why its cases establish the threshold requirement that the conduct to be enjoined be in breach of contract. In *Boys Markets* the Court stated the issue to be decided as whether the "Norris-LaGuardia Act precludes a federal district court from enjoining a strike in breach of a no-strike obligation . . ."398 U.S. at 237. Similarly, in *Gateway Coal Co* v. *United Mine Workers,* 414 U.S. 368 (1874), the Court, after concluding that the work stoppage was over an arbitrable issue, stated that the answer to the question whether the stoppage is enjoinable "depends on whether the union was under a contractual duty not to strike." *Id.* at 380.[8] And in *Buffalo Forge* the Court rejected the claim that a sympathy strike could be enjoined before it was decided whether the strike was in breach of contract. Thus, if the concerted activity here was "over" an unfair labor practice, it was not enjoinable.

In the court below we suggested that rather than deciding for itself whether the NRI's conduct violated the NLRA, the court should defer to the ongoing NLRB proceedings.[9]

[8] *Gateway Coal* is similar to this case in that the union contended that its conduct was not in breach of contract because within the scope of an "implied exception" to the no-strike clause, there, the exception allowing employees to refuse to work under abnormally dangrous conditions. The Court "agree[d]" that "a work stoppage called solely to protect employees from immediate danger . . . cannot be the basis for . . . a *Boys Markets* injunction," 414 U.S. at 385, but found that the work stoppage in the case before it was not of this character.

[9] Such a course would have been consistent with the doctrine of "primary jurisdiction" which recognizes that even where a court has the power to grant a requested remedy, "it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure '[u]niformity and consistency in the regulation of business entrusted to a particular agency,' or where

> 'the limited functions of review by the judiciary [would be] more rationally exercised by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conference* v. *United States,* 342 U.S. 570, 574-575." *Nader* v. *Allegheny Airlines,* 426 U.S. 290, 303-04 (1976).

The court below rejected this argument, citing a line of cases holding, in the court's words, that "the district court's jurisdiction is not curtailed even if the disputed activity also constitute an unfair labor practice." App. at 8.[10] But even if deferral was not appropriate, the alternative course the court took surely was incorrect. For what the court held was that it was of no consequence whether the employer had violated the NLRA; as the court stated:

> "We do not in this case consider the merits of the company's actions; we consider only whether the union's *reactions* created a dispute which the parties obligated themselves to resolve through arbitration under the collective bargaining agreement. App. at 7 n. 8.

This refusal to decide the unfair practices issue places the decision in square conflict with *Mastro Plastics.* Since, as we have shown, only concerted activity in breach of contract can be enjoined under *Boys Markets,* and since, under *Mastro Plastics,* concerted activity in response to unfair labor practices does not violate a general no-strike clause, it necessarily follows that if the court did not defer to the NLRB it was required to decide for itself whether the em-

[10] These cases are not relevant here. The "disputed activity" in this case—the employees' concerted refusal to comply with NRI's work rule—is not alleged to "constitute an unfair labor practice." Rather, our argument is that the employees' conduct does not violate the collective bargaining agreement because it was undertaken in response to unfair labor practices committed by NRI. Thus, here, unlike the cases on which the court relied, resolution of the unfair labor practice issue is a necessary prerequisite to deciding whether the concerted activity is in breach of contract.

We recognize, of course, that deferral here would have meant a delay before the propriety of issuing an injunction could be decided; that factor might dictate adoption of the alternative course discussed in the text.

ployer had committed unfair labor practices.[11] Its failure to do so means that it has enjoined concerted activity that arguably is not in breach of contract.

The approach of the court below would in effect extend *Boys Markets* to permit injunctions against a proper form of employee concerted conduct—an unfair labor practice protest, not in breach of contract. This approach simply cannot be squared with the central purpose of Norris-LaGuardia. The importance of deciding the proper procedure to follow—and the proper issues to be decided—in cases of this type is self-evident. The number of reported cases dealing with unfair labor practice strikes is elequent testimony to the frequency with which such strikes occur.[12] Indeed, during the period that collective bargaining agreements are in effect such strikes may occur more frequently than economic strikes, sympathy strikes, or strikes designed solely to enforce the contract, yet this Court has considered the applicability of *Boys Markets* only in the latter contexts. To provide guidance to the lower courts in this important area, and to rectify the lower court's departure from the principles of Norris-LaGuardia and *Mastro Plastics,* the Court should grant a writ of certiorari.

---

[11] Such a procedure would parallel that approved by this Court in *NLRB* v. *C & C Plywood Corp.* 385 U.S. 428 (1967) in which the Board decides contract issues in resolving unfair labor practice claims.

[12] *See, e.g.*, cases cited in Note, *The Unfair Labor Practice Strike,* 46 N.Y.U. L. Rev. 988 (1971); and BNA, Labor Relations Cumulative Digest and Index, Pars. 52.344, 52.3612, 52.3614, 56.4292, 80.559.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

BERNARD KLEIMAN
1 East Wacker Drive
Suite 1910
Chicago, Illinois 60601

JAMES E. YOUNGDAHL
KENNETH L. SCHORR
Youngdahl, Larrison & Agee
2101 Main Street
Post Office Box 6030
Little Rock, Arkansas 72216

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
JEREMIAH A. COLLINS
Bredhoff, Gottesman, Cohen & Weinberg
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

CARL B. FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1318

NATIONAL REJECTORS INDUSTRIES, ETC.,

Appellee,

v.

UNITED STEELWORKERS OF AMERICA, ETC., ET AL.,

Appellants.

APPEAL from the United District Court for the Western District of Arkansas.

Submitted: June 17, 1977

Filed: August 30, 1977

Before GIBSON, Chief Judge, LAY and Ross, Circuit Judges.

Ross, Circuit Judge.

Plaintiff-appellee National Rejectors Industries (NRI or the company) commenced this action in district court seeking money damages and injunctive relief to redress violations and to compel specific performance of a collective-bargaining agreement. Defendant-appellants are the United Steelworkers of America, AFL-CIO (the union), its Local No. 6178 (the local), and several union officials. Disputes had arisen between the parties culminating in the suspension of large numbers of union employees for violations of

company work rules, resulting in a sharp decline in productivity at the company's plant. The district court assumed jurisdiction pursuant to section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, and granted an injunction enjoining, *inter alia*, further violations of the work rules, and ordering the parties to submit their disputes to arbitration proceedings. Pending appeal, the district court stayed the latter portion of its order. Similarly, an administrative panel of this court stayed the remainder of the order pending resolution on the merits. For the reasons hereafter stated, we dissolve these stays and affirm the judgment of this district court.[1]

I.

NRI is a subsidiary of a Delaware corporation and maintains an office and plant in Hot Springs, Arkansas where it manufactures coin and currency changing devices. The company employs over 400 persons at its Hot Springs plant, some 300 of which are production and maintenance workers. The union and its local have been the exclusive collective bargaining representatives for the company's production and maintenance workers since 1961. The parties have stipulated that the company is an industry affecting commerce within the meaning of sections 2(7) and 301 of the LMRA, 29 U.S.C. §§ 152(7) and 185. It is likewise agreed that the union is a labor organization within the meaning of section 2(5) of the Act, 29 U.S.C. § 152(5), and that it is engaged in representing employee members in the Western District of Arkansas. *See* LMRA § 301(c)(2), 29 U.S.C. § 185(c)(2).

The company and the union are parties to a collective-

[1] An order dissolving the stays and reinstating the injunction issued by the district court was entered by this court on June 17, 1977, after hearing oral argument of the parties, Judge Lay dissenting.

bargaining agreement.[2] Article XXXIV of the agreement provides that "there shall be no strikes, slow-ups, stoppages of work • • • or other interference with the operations of the Company during the term of this Agreement." Article XV provides that all disputes concerning the meaning or application of the agreement be resolved by a four-step grievance and arbitration procedure.[3] "Step 1" calls for

GRIEVANCE PROCEDURE

Section 1. Should any difference arise between the Company and the Union or its members employed by the Company as to the meaning, application or violation of the terms and provisions of this Agreement, there shall be no suspension or impeding of work on the part of the Union or lockout on the part of the Company on account of such differences—but an earnest effort shall be made to settle such differences immediately in the following manner:

Following are four steps, discussed in text *infra*.

any grievance to be first submitted by the affected employee to his foreman, the latter to respond in writing to the grievance. "Step 2" provides that appeals by either party be submitted to a meeting between management representatives and the grievance committee of the local union. "Step 3" requires further appeals to be resolved at a meeting between the national organization of the union and representatives of company executives. If the dispute is still not resolved, "Step 4" provides for submission of the matter to final and binding arbitration, and specifies a method of selecting an arbiter.

At a meeting in December 1976 an incident occurred which resulted in the company's discharging Frankie Joe Russell, president of the local union, and suspending for 30 days two other officers of the local.[4] The union filed griev-

[2] The agreement is dated January 8, 1975, and by its terms will remain in full force and effect until January 15, 1978.

[3] Article XV states in part:

[4] The two suspended officers were Clois Lishbrook, vice-president, and Margaret Sue Loudermill, recording secretary.

ances with respect to these actions. Russell and the two suspended officers were designated members of the local's grievance committee for purposes of "Step 2" of the grievance procedure outlined above. When Step 2 negotiations were reached, the company requested that further proceedings be conducted at the next higher level, over the local's grievance committee, in accordance with its interpretation of Article XV of the collective-bargaining agreement.[5] The union refused, insisting that Russell and the two suspended officers be involved in the grievance proceedings. The company in turn refused to meet with Mr. Russell, but remained willing to proceed at the next higher level. The union then filed grievances over the company's refusal to abide by the

[5] Section 4 of Article XV states in pertinent part:

> Should the actions of the representatives of either party be such that the integrity of the grievance procedure is threatened, then the authorized 3rd step representative of the Company or Union shall notify the opposite party who shall investigate and report back the results of such investigation and the corrective action taken, if any. If such report is not satisfactory or if the facts are in dispute either party may request a meeting for the purpose of determining the facts and settling the issue. If the issue is not satisfactorily settled at this meeting either party may request the other to take such action as may be appropriate and necessary to correct the problem. *In this event, the grievance machinery shall continue to function with the next highest officials of the Company and Union conducting the meetings* to insure the processing of grievances in a timely manner until such time as both parties are agreed that normal operation of the grievance procedure can be resumed. (Emphasis supplied.)

The company felt Mr. Russell's participation in the negotiations concerning his own dismissal threatened the integrity of the grievance procedure and requested a union investigation of his conduct. The union reported back that there was nothing irregular in Mr. Russell's conduct. This report being unsatisfactory, the company requested a meeting and one was had. Being still unable to settle the issue, the company suggested that Mr. Russell's removal from the grievance committee was necessary to correct the problem. The company contends that the grievance machinery should then have continued to operate with the next highest union representatives, in accordance with the emphasized language of section 4.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 77-1318

NATIONAL REJECTORS INDUSTRIES, ETC.,

Appellee,

v.

UNITED STEELWORKERS OF AMERICA, ETC., ET AL.,

Appellants.

APPEAL from the United States District Court for the Western District of Arkansas.

Submitted: June 17, 1977

Filed: August 30, 1977

Before GIBSON, Chief Judge, LAY and ROSS, Circuit Judges.

Ross, Circuit Judge.

Plaintiff-appellee National Rejectors Industries (NRI or the company) commenced this action in district court seeking money damages and injunctive relief to redress violations and to compel specific performance of a collective-bargaining agreement. Defendant-appellants are the United Steelworkers of America, AFL-CIO (the union), its Local No. 6178 (the local), and several union officials. Disputes had arisen between the parties culminating in the suspension of large numbers of union employees for violations of

company work rules, resulting in a sharp decline in productivity at the company's plant. The district court assumed jurisdiction pursuant to section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, and granted an injunction enjoining, *inter alia,* further violations of the work rules, and ordering the parties to submit their disputes to arbitration proceedings. Pending appeal, the district court stayed the latter portion of its order. Similarly, an administrative panel of this court stayed the remainder of the order pending resolution on the merits. For the reasons hereafter stated, we dissolve these stays and affirm the judgment of this district court.[1]

I.

NRI is a subsidiary of a Delaware corporation and maintains an office and plant in Hot Springs, Arkansas where it manufactures coin and currency changing devices. The company employs over 400 persons at its Hot Springs plant, some 300 of which are production and maintenance workers. The union and its local have been the exclusive collective bargaining representatives for the company's production and maintenance workers since 1961. The parties have stipulated that the company is an industry affecting commerce within the meaning of sections 2(7) and 301 of the LMRA, 29 U.S.C. §§ 152(7) and 185. It is likewise agreed that the union is a labor organization within the meaning of section 2(5) of the Act, 29 U.S.C. § 152(5), and that it is engaged in representing employee members in the Western District of Arkansas. *See* LMRA § 301(c)(2), 29 U.S.C. § 185(c)(2).

The company and the union are parties to a collective-

[1] An order dissolving the stays and reinstating the injunction issued by the district court was entered by this court on June 17, 1977, after hearing oral argument of the parties, Judge Lay dissenting.

bargaining agreement.[2] Article XXXIV of the agreement provides that "there shall be no strikes, slow-ups, stoppages of work • • • or other interference with the operations of the Company during the term of this Agreement." Article XV provides that all disputes concerning the meaning or application of the agreement be resolved by a four-step grievance and arbitration procedure.[3] "Step 1" calls for

GRIEVANCE PROCEDURE

Section 1. Should any difference arise between the Company and the Union or its members employed by the Company as to the meaning, application or violation of the terms and provisions of this Agreement, there shall be no suspension or impeding of work on the part of the Union or lockout on the part of the Company on account of such differences—but an earnest effort shall be made to settle such differences immediately in the following manner:

Following are four steps, discussed in text *infra*.

any grievance to be first submitted by the affected employee to his foreman, the latter to respond in writing to the grievance. "Step 2" provides that appeals by either party be submitted to a meeting between management representatives and the grievance committee of the local union. "Step 3" requires further appeals to be resolved at a meeting between the national organization of the union and representatives of company executives. If the dispute is still not resolved, "Step 4" provides for submission of the matter to final and binding arbitration, and specifies a method of selecting an arbiter.

At a meeting in December 1976 an incident occurred which resulted in the company's discharging Frankie Joe Russell, president of the local union, and suspending for 30 days two other officers of the local.[4] The union filed griev-

[2] The agreement is dated January 8, 1975, and by its terms will remain in full force and effect until January 15, 1978.

[3] Article XV states in part:

[4] The two suspended officers were Clois Lishbrook, vice-president, and Margaret Sue Loudermill, recording secretary.

ances with respect to these actions. Russell and the two suspended officers were designated members of the local's grievance committee for purposes of "Step 2" of the grievance procedure outlined above. When Step 2 negotiations were reached, the company requested that further proceedings be conducted at the next higher level, over the local's grievance committee, in accordance with its interpretation of Article XV of the collective-bargaining agreement.[5] The union refused, insisting that Russell and the two suspended officers be involved in the grievance proceedings. The company in turn refused to meet with Mr. Russell, but remained willing to proceed at the next higher level. The union then filed grievances over the company's refusal to abide by the

[5] Section 4 of Article XV states in pertinent part:

> Should the actions of the representatives of either party be such that the integrity of the grievance procedure is threatened, then the authorized 3rd step representative of the Company or Union shall notify the opposite party who shall investigate and report back the results of such investigation and the corrective action taken, if any. If such report is not satisfactory or if the facts are in dispute either party may request a meeting for the purpose of determining the facts and settling the issue. If the issue is not satisfactorily settled at this meeting either party may request the other to take such action as may be appropriate and necessary to correct the problem. *In this event, the grievance machinery shall continue to function with the next highest officials of the Company and Union conducting the meetings* to insure the processing of grievances in a timely manner until such time as both parties are agreed that normal operation of the grievance procedure can be resumed. (Emphasis supplied.)

The company felt Mr. Russell's participation in the negotiations concerning his own dismissal threatened the integrity of the grievance procedure and requested a union investigation of his conduct. The union reported back that there was nothing irregular in Mr. Russell's conduct. This report being unsatisfactory, the company requested a meeting and one was had. Being still unable to settle the issue, the company suggested that Mr. Russell's removal from the grievance committee was necessary to correct the problem. The company contends that the grievance machinery should then have continued to operate with the next highest union representatives, in accordance with the emphasized language of section 4.

grievance procedures. At this point, negotiations between the parties reached an impasse.

On January 13, 1977, the union filed charges against the company with the National Labor Relations Board (NLRB), alleging that the dismissal and suspensions of the local officers constituted unfair labor practices under section 8 of the National Labor Relations Act, 29 U.S.C. §158, in violation of rights guaranteed in section 7 of the Act, 29 U.S.C. § 157. On February 22nd, the NLRB filed a complaint against the company incorporating these allegations.

In early March 1977 the company promulgated six new work rules for employees at the Hot Springs plant.[6] The union was given notice of these rules, but again refused to negotiate with the company without Mr. Russell being present as a representative. The company then placed the rules into effect on March 14. Clois Lishbrook, acting president of the local in the absence of Mr. Russell, told company representatives that she did not intend to comply with the

[6] The new work rules read as follows:

1. There will be no magazine reading, newspaper reading, book reading, crossword puzzles worked on, games played, or any other non-NRI reading during working hours, except during authorized breaks or lunch periods.
2. There will be no soliciting for any purpose during work hours, except during authorized breaks or lunch periods.
3. All employees are required to log into and out of their departments per published instructions.
4. All union officers must log in and out on official grievance handling time per published instructions.
5. There will be no consumption of food or beverages in any work area, except during authorized breaks or lunch breaks.
6. Falsification of production counts, records or activity logs is prohibited. Each employee is required to accurately record production counts, other records and the activity log.

Donald Brannan, director of personnel and industrial relations for NRI, testified that the company had experienced problems with employees leaving their work areas without authorization since November of 1976.

new rules and stated that she did not think any of the other union employees should comply with them either.

Under procedures established by the company for enforcing its work rules, an employee was given a verbal warning following his first violation; a second violation resulted in a written warning. Following a third violation, the employee was informed that further violations would result in his being temporarily suspended.

Within four days after the new rules went into effect, 138 employees had been suspended for violating them. The union immediately filed grievances with respect to each of these suspensions. By this time, production at the plant had dropped to 30% of normal. In an effort to maintain an active work force, the company decided on March 18 to suspend further enforcement of the rules.[7] Later that day, the company notified the union that it was willing to waive the intermediate steps of the grievance procedure and begin immediate arbitration on all the grievances theretofore filed by the union. The company also offered to continue suspending enforcement of the work rules pending resolution of these grievances through arbitration. When the union refused, the company sought relief in the district court.

The district court found that, by violating the work rules, union employees had engaged in concerted activity calculated to slow up and impede production at the plant, that this activity was precipitated by disputes then exising between the union and the company, that these disputes were arbitrable and, therefore, that these actions violated Articles XV and XXXIV of the collective-bargaining agreement. Accordingly, the court entered its order enjoining further union efforts to impede production at the plant and requiring the parties to submit their disputes to arbitration. The union responded by filing this appeal.

[7] Violations of rules 3 and 4, relating to logging in and out procedures (*see* note 5 *supra*) were involved in each of the 138 employee suspensions. It was enforcement of these two rules which the company suspended.

II.

We are confronted at the outset with the union's contention that the instant case falls within the exclusive jurisdiction of the NLRB, thus depriving the district court of its power to issue an injunction. This argument is based on the preemption doctrine, announced in *San Diego Trades Council* v. *Garmon*, 359 U.S. 236 (1959), which teaches that "[w]hen an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245.

The union asserts that the company's dismissal of Frankie Joe Russell, its subsequent refusal to meet with him, and its promulgation of the new work rules are unfair labor practices under § 8 of the National Labor Relations Act, 29 U.S.C. § 158. This may well be true, though the question is not before us.[8] It does not follow, however, that such a conclusion would serve to divest the district court of jurisdiction in this case, which was brought to enforce the terms of a collective-bargaining agreement under § 301(a) of the LMRA, 29 U.S.C. § 185(a).[9] It has long been recognized

[8] We do not in this case consider the merits of the company's actions; we consider only whether the union's *reactions* created a dispute which the parties had obligated themselves to resolve through arbitration under the collective-bargaining agreement.

[9] Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

that, by its enactment of § 301, "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'" *Charles Dowd Box Co., Inc.* v *Courtney,* 368 U.S. 502, 513 (1962). Thus, in cases brought under § 301, the district court's jurisdiction is not curtailed even if the disputed activity also constitutes an unfair labor practice. *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25,* 45 U.S.L.W. 4263, 4265 n.8 (U.S. Mar. 7, 1977); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville,* 417 U.S. 12, 16 (1974).

Accordingly, we reject the union's claim that the NLRB has exclusive jurisdiction over the subject matter of this case.

III.

The union next contends that the district court was precluded from issuing an injunction by the anti-injunction provisions of the Norris-LaGuardia Act.[10] In making this argument the union candidly acknowledges that in *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970), the Supreme Court recognized an exception to Norris-LaGuardia's anti-injunction provisions in certain cases brought under § 301.[11] It nevertheless insists that this exception does not apply to the facts of the instant case. We therefore begin our consideration of the union's claim by examining the scope of the *Boys Markets* exception.

In *Boys Markets* the employer and the union were parties to a collective-bargaining agreement containing, *inter alia,* a "no-strike" obligation and provisions for resolution of all disputes arising under the contract through mandatory

[10] Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides in part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute • • •.

[11] 29 U.S.C. § 185, quoted in part in note 8, *supra.*

adjustment and arbitration procedures. A dispute arose between the parties when the union demanded that supervisory employees cease performing tasks claimed to be union work. The union struck when this demand was rejected. The employer sought injunctive relief under § 301 to halt the strike, admitted to be a violation of the no-strike clause of the contract. The union defended in part on the basis of Norris-LaGuardia's anti-injunction provisions. The Supreme Court was thus called upon to balance the conflicting policies embodied in Norris-LaGuardia's apparent flat ban against injunctions on the one hand, and the authority conferred by § 301 to resolve contract disputes on the other. After reviewing the history of both statutes, the Court struck this balance by declaring that "Norris-LaGuardia's policy of nonintervention by the federal courts should yield to the overriding interest in the successful implementation of the arbitration process." 398 U.S. at 252. The rationale of this decision is apparent:

> Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designated to obviate.
>
> • • •
>
> We conclude, therefore, that the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of this case.

398 U.S. at 249, 253. In reaching its conclusion, the Court cautioned that its holding was a "narrow one. • • • We deal only with the situation in which a collective-bargaining con-

tract contains a mandatory grievance adjustment or arbitration procedure." *Id.* at 253. Cases decided subsequent to *Boys Markets* have made it clear that an injunction is appropriate only when such relief is necessary to compel specific performance of the mandatory arbitration provisions of the contract. *See Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397, 409 (1976). Thus, it is not the strike itself, or the violation of a no-strike clause that it represents, that will be enjoined. It is essential in each case that the activity being enjoined represents a union response to a dispute over a grievance which the union was contractually bound to arbitrate. *Id.* Finally, adopting the principles expressed in the dissenting opinion in *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962), the Court has required that:

> Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.

Boys Markets, supra, at 254, *quoting from Sinclair, supra,* at 228.

Summarizing, we conclude that *Boys Markets* and later cases authorize the issuance of an injunction when (1) the union is engaged in a strike or other violation of a "no strike" clause of a collective-bargaining agreement, if (2) the violation was precipitated by a dispute between the parties, which dispute is (3) subject to mandatory grievance or arbitration procedures provided for in the agreement, and (4) issuance of the injunction is otherwise warranted under ordinary principles of equity.

Applying these principles to the facts of the instant case, we conclude that the district court properly issued an in-

junction against further disruptions of the company's operations in conjunction with its order to arbitrate.

> (A) *Union employees, by refusing to comply with the work rules, violated the terms of the "no strike" clause.*

Article XXXIV of the collective-bargaining agreement provides that, during the term of the contract, there "shall be no strikes, slow-ups, stoppages of work, sit-down strikes, refusals to handle merchandise, material or equipment *or other interference with the operations of the Company.*" (Emphasis supplied.) The district court found that union employees at the Hot Springs plant violated the company's work rules in order to incur suspensions for the purpose of disrupting operations at the plant. The union does not challenge the accuracy of this finding and we conclude that substantial evidence in the record supports it. The testimony establishes that under company procedures suspension of an employee resulted only after the employee had violated the work rule at least four times. Prior violations were dealt with by giving the employee a verbal warning, a written warning, and notice that further violations would result in suspension. The work rules here in question involved a relatively simple procedure of writing one's name in a company log book before leaving his assigned work station during business hours. Nevertheless, some 138 employees managed to violate the rules a sufficient number of times to incur suspension within only three working days after the rules were placed in effect. In addition, the acting president of the local union expressed to representatives of the company her intention to disregard the rules and her belief that other employees should do the same. This testimony is wholly unrebutted by the union.

Accordingly, we agree with the district court that the employees violated the work rules in order to incur suspensions for the purpose of disrupting operations at the plant,

and that this activity violated the provisions of Article XXXIV of the collective-bargaining agreement.[12]

> (B) *and* (C) *The violation of the "no strike" clause was precipitated by a dispute between the parties over a grievance subject to arbitration under the collective-bargaining agreement.*

There can be no question on the record before us that the violations of the work rules and consequent suspensions resulted from a dispute between the parties. The district court concluded only that this dispute was over grievances "then existing" between the parties "having to do with interpretation of the Collective Bargaining [Agreement] and operations and procedures thereunder." Whether these grievances related to the dismissal of Frankie Joe Russell and the suspensions of the other two officers, or whether they related to dissatisfaction with the work rules themselves, or both, there is no contention made that such grievances would not be subject to the grievance and arbitration procedures specified in the contract. Indeed, the union has filed numerous grievances with respect to each in an attempt to invoke those procedures.

The essence of the union's argument is that the company's unwillingness to meet with Mr. Russell as a member of the local's grievance committee made arbitration an impossible goal since "Step 2" of the grievance procedure leading to arbitration could never be completed. We reject this argument for two reasons. First, we are convinced that the issue of whether completion of "Step 2" is a condition precedent to arbitration itself presents an arbitrable dispute under the terms of Article XV of the agreement. Section 4 of that Article specifies circumstances in which "Step 2" meetings are not required when the conduct of either

[12] The union's contention that no injunction can issue because there was no "strike" as such is without merit. *See Avco Corp.* v. *Local No. 787, UAW*, 459 F.2d 968, 974 (3rd Cir. 1972) (enjoining employee refusal to work overtime.)

party "threatens the integrity" of the grievance procedure.[13] Section 1 of that Article broadly makes all questions concerning the "meaning" or "application" of the provisions of the contract subject to the specified grievance and arbitration procedures. We conclude that this language encompasses the dispute concerning the necessity of completing "Step 2" before proceeding to arbitration.[14] Second, we are unpersuaded that questions concerning the procedural aspects of resolving a dispute of this kind present a bar to arbitration.

> Once it is determined, as we have, that the parties are obligated to submit the *subject matter* of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.
>
> • • •
>
> [W]e think it best accords with the usual purposes of an arbitration clause and with the policy behind federal labor law to regard procedural disputes but as aspects of the dispute which called the grievance procedures into play.

John Wiley & Sons v. *Livingston*, 376 U.S. 543, 557, 559 (1964) (emphasis supplied).

> (D) *An injunction was warranted in the circumstances of this case under general principles of equity.*

The district court found, and it is undisputed, that following the suspensions of employees for violating the work rules, production at the company's plant dropped to 30% of normal. The record also establishes that continued inter-

[13] *See* note 4, *supra*.

[14] We are bolstered in our conclusion by the Supreme Court's consistent recognition of the presumption favoring a finding of arbitrability as a means of implementing the "well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements." *Nolde Brothers, Inc.* v. *Local No. 358, Baker & Confectionery Workers*, 45 U.S.L.W. 4251, 4254 (U.S. Mar. 7, 1977).

ferences with production will result in lower output, delays in deliveries, and may result in failures by the company to perform existing contracts and in securing future contracts. In light of our conclusion that the suspensions were stimulated by the employees' desire to disrupt operations at the plant, we likewise conclude that the company's willingness to suspend enforcement of the work rules does not preclude the district court's finding that irreparable injury will result to the company if an injunction against future disruptions is not granted. It is likewise undisputed that the company was at all times prepared to proceed to a resolution of its disputes with the union through arbitration. Finally, the union offered no evidence of how it would be injured if an injunction was granted, with the exception of its claim that the local would be deprived of the services of Frankie Joe Russell as its representative. In these circumstances, we conclude that an injunction against further union disruptions of company operations, and ordering the parties to proceed to arbitration, was justified.

Anheuser-Busch, Inc. v. *Teamsters Local No. 633,* 511 F.2d 1097 (1st Cir.), *cert. denied,* 423 U.S. 875 (1975), the case primarily relied upon by the union, is not to the contrary. In that case the employer instituted a work rule prohibiting employees from wearing "tank-tops" to work. When the employees persisted in wearing such attire, the employer suspended them, thereby effectively shutting down the plant. The court reversed an order of the district court granting an injunction, saying "an employer cannot be permitted to qualify for injunctive relief simply by responding to minor employee infractions in a way that brings serious and irreparable damage upon himself by causing a shutdown." *Id.* at 1099. In considering the potential harm to the employer *in the absence of an injunction,* the court concluded that "[h]aving some employees wear tank-tops, even during the summer when there are likely to be more than the usual number of persons touring the plant, cannot

be considered the type of injury properly providing a basis for injunctive relief." *Id.* at 1100.

We see no analogy between the facts presented in *Anheuser-Busch* and those in the instant case. Here, NRI did not bring about the disruption itself by insisting upon enforcement of minor work rules. The company was willing to, and did in fact suspend enforcement of its rules pending resolution of the underlying dispute through arbitration. In addition, the injury to NRI threatened by continued disruptions of employees at the Hot Springs plant, even in the absence of work rules, is clearly greater than the potential harm of having one's employees present an unsightly appearance to visitors at the plant. We think these factors sufficiently distinguish this case from the situation presented in *Anheuser-Busch.* The court there appears to have foreseen this distinction and carefully limited the rule it was announcing, saying:

> Our holding here should not be taken as one that an employer will never be successful in demonstrating that he will be seriously and irreparably harmed if prevented from effectively enforcing a work rule pending arbitration. * * * [I]n another case, there might be an adequate showing that *employee disregard of work rules was seriously undermining an employer's ability to conduct his business.* Here, however, there has been on the employer's part nothing more than the undifferentiated claim that there exists a right to make and enforce rules pending the outcome of a grievance and arbitration procedure, and we reject the contention that the labor injunction is available in the ordinary course of events as an enforcement mechanism. * * * We hold merely that in this case there was not a showing of *potential injury adequate to support relief under general equitable principles.*

Id. at 1100 (emphasis supplied).

In conclusion, we are satisfied that the district court applied the appropriate standards for determining whether an injunction should issue, and that his order conforms with

the spirit of the narrow exception to the Norris-LaGuardia Act created by *Boys Markets*. Accordingly, the judgment of the district court should be and is affirmed.

LAY, Circuit Judge, Dissenting.

The majority opinion miscontrues the limited incursion into the Norris-LaGuardia Act, 29 U.S.C. § 104, authorized by *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970). As explained in *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397, 402 (1976), the limited authority which *Boys Markets* granted to a federal court to enjoin a strike in violation of a no-strike clause within a collective bargaining agreement is applicable only when the strike is *over* the arbitrable dispute. In the present case the record is clear that the dispute which led to the refusal to arbitrate is not related to the alleged violation of the no-strike clause. Rather, the dispute arises from the inability of the company and the union to agree on the proper grievance procedures.

The fundamental grievance involved in the present case relates to the discharge of an employee who is a union representative. The union is willing to submit this issue to the grievance and arbitration procedures set forth under the contract. Tangentially, there now exists a grievance over the implementation of a petty work rule requiring, *inter alia*, employees to sign in and out when going to the bathroom. The union is willing to submit this dispute to grievance and aribtration procedures as well. The company has indicated that it is willing to submit these issues to arbitration but refuses to negotiate grievances with the union if the discharged union representative is present. The union insists that the union representative be present; thus the parties have reached an impasse.[1] It should be plain enough

[1] The company is willing to suspend the work rules if the union is willing to acquiesce in the company's proposed grievance procedure. I think the obvious inference follows that the implementation of the work rule by the company was in retaliation to the

that refusal to arbitrate in this case is not related to the enforcement of the work rule, or to the employees' refusal to follow the work rule, or to the company's suspensions for violation of the same. The impasse reached relates to the procedural steps to be followed in implementation of the grievance and arbitration procedures under the contract. At issue is a matter of contract interpretation, and although a procedural question is presented it is now well-settled that procedural issues as well as substantive questions are exclusively for the arbiter. *See John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 557 (1943); *Drivers Local No. 120* v. *Sears, Roebuck & Co.*, 535 F.2d 1072, 1075 (8th Cir. 1976). Although the majority agrees with this premise, it finds a violation of the no-strike clause of the contract resulting from the employees' noncompliance with work rules and thus encroaches upon the arbiter's exclusive jurisdiction. *Cf. Buffalo Forge Co.* v. *Steelworkers, supra.* In thus interpreting the contract the majority ignores the decisions of this court and other courts which have uniformly held that the interpretation of the collective bargaining agreement lies within the exclusive domain of the arbiter. *See* e.g. *Drivers Local No. 120* v. *Sears, Roebuck & Co. supra*, at 1075.

Relying upon *John Wiley & Sons* v. *Livingston, supra*, the majority finds that the union's insistance on following the procedural steps set out in the contract cannot be a bar to arbitration over the disputes. As valid as this view may be, it does not follow from *Wiley*, as the majority concludes that the procedural impasse reached necessarily grows out of the arbitrable dispute authorizing injunctive relief pending arbitration. *Wiley* clearly does not come close to holding this. This view ignores the fact that the union is ready and willing to submit the issue over the discharge (or anything else) to the grievance and arbitration procedure under the

union's refusal to arbitrate without the discharged union representative present.

contract. What the union refuses to do is to acquiesce in the company's interpretation of the grievance clause as to the procedure to be followed. The *Wiley* decision does provide the solution for the present case. The district court should limit its order to require the parties to submit the procedural issue and at least the related issue of the discharge to arbitration.

Both *Anheuser-Busch, Inc.*, v. *Teamsters Local No. 633*, 511 F.2d 1097 (1st Cir. 1975), *cert. denied*, 423 U.S. 875 (1975), and *Buffalo Forge* indicate that the court may order arbitration without issuing a plenary injunction affecting the no-strike clause. In *Anheuser-Busch* the court made clear in its conclusion that the union was willing to arbitrate and no limited order was necessary. In *Buffalo Forge* the Court explicitly acknowledged that the employer was entitled to an order requiring the union to arbitrate if the union refused to do so. However, as the Court observed:

> [I]t does not follow that the District Court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator, despite the express prohibition of §4(a) of the Norris-LaGuardia Act against injunctions prohibiting any person from "[c]easing or refusing to perform any work or to remain in any relation of employment."

428 U.S. at 410.

Here, the district court should stay the issuance of its injunction as it relates to enforcing the work rule pending arbitration and resolution of the procedural issue involved.

The majority decision allows the federal court to intervene in a breach of contract case and violate the narrow jurisdictional basis afforded the court in *Boys Markets*. As Mr. Justice White stated in *Buffalo Forge*:

> If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration

> provisions even though the injunction would otherwise violate one of the express prohibitions of §4. The court in such cases would be permitted, if the dispute was arbitrable, to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process. This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts, not just for the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets*, but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act.

428 U.S. at 410-11 (footnotes omitted).

Even assuming injunctive relief might be authorized under the *Boys Markets* case, which I dispute, such relief still should be denied because the employer has failed to demonstrate irreparable harm. *See Detroit Newspaper Publishers Association* v. *Detroit Typographical Union No. 18*, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). Here the so-called strike or slow down was created by the employer's own conduct in suspending employees for violation of a work rule. There exists no parallel decision authorizing injunctive relief under similar circumstances. In my judgment, *Anheuser-Busch* is directly controlling. As Chief Judge Coffin observed:

> Although the district court's findings on injury make reference to the fact that the plant was effectively shut down, an employer cannot be permitted to qualify for injunctive relief simply by responding to minor employee infractions in a way that brings serious and irreparable damage upon himself by causing a shutdown.

511 F.2d at 1099.

The company is willing to suspend enforcement of the work rule pending arbitration; that is, it is willing to suspend enforcement of the rule as long as the union adopts its procedural interpretation of the contract. This in itself should be sufficient to show a lack of irreparable harm. Since the company can prevent the harm by its own conduct, it is incredible to me that the harm is found to be irreparable by the majority. *Anheuser-Busch, Inc.* v. *Teamsters Local No. 633*, 511 F.2d at 1099.

In any event, the company's willingness to suspend the work rule pending arbitration makes it clear that if this court would order the parties to arbitrate the grievance involved, injunctive relief as to the enforcement of the work rule would not be necessary. It seems to me that this is a much better solution than authorizing a federal court to exercise its jurisdiction in an area where it is both undesirable and unlawful.[2]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[2] As the Court indicated in *Boys Markets*:

> Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. *Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance.*

398 U.S. at 253 (emphasis added).

APPENDIX B

U.S. DISTRICT COURT,
WESTERN DISTRICT OF ARKANSAS

NATIONAL REJECTORS INDUSTRIES
v.
UNITED STEELWORKERS OF AMERICA, ET AL. } 77-6018

April 16, 1977

OREN HARRIS, Senior District Judge:—This is an action filed by plaintiff, National Rejectors Industries, division of UMC Industries, Inc., pursuant to Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, seeking injunctive relief, specific performance of an arbitration agreement, and damages for alleged violations and breaches of a labor-management agreement. Defendants are the Union and its local, the president and two other officers of the local union, and the International representative of the parent Union.

The matter was first presented in chambers on March 22, 1977 on application of plaintiff for a temporary restraining order. All parties appeared and agreed to voluntarily maintain the status quo pending a hearing to be held on March 30, 1977, on the application for a preliminary injunction.

Prior to the scheduled hearing date, the defendants filed a motion to dismiss the complaint for lack of jurisdiction, on the basis that unfair labor practice charges were pending as to the same matters before the National Labor Relations Board. The motion was supported by affidavit, to which were attached documents relating to the charges and proceedings before the NLRB. Plaintiff responded to the motion.

The hearing was held, as scheduled on March 30, 1977. All parties were present and represented by counsel. Argu-

ment as to the motion of defendants was first presented. From the briefs and arguments of counsel, the pleadings and the exhibits received as to the motion, the Court concluded that jurisdiction exists in this Court as to this proceeding pursuant to Section 301 of the LMRA, 29 U.S.C. § 185, as interpreted by the Courts in Smith v. Evening News Ass'n, 371 U.S. 195 (1962); William E. Arnold Co. v. Carpenters, 417 U.S. 12 (1975), and Barunica v. United Hatters, Cap & Millinery Workers, Local 55, 321 F.2d 764 (1963). An order will, therefore, be entered denying the motion of defendants that the complaint be dismissed for lack of jurisdiction.

The Court proceeded to hear evidence from witnesses as presented, received exhibits, and heard arguments of counsel. From the pleadings, evidence, exhibits and argument, the Court makes the following findings of fact and conclusions of law, which are incorporated herein pursuant to Rule 52, Federal Rules of Civil Procedure:

The Steelworkers Union and its local have been the collective bargaining representative for the production and maintenance employees at plaintiff's Hot Springs, Arkansas, plant since 1961. The current collective bargaining agreement was introduced. It is dated January 8, 1975 and provides that it shall continue in effect through January 15, 1978, and for one year periods thereafter, unless terminated by notice after the 1978 date. In any event, the agreement was in full force and effect at all times material to this litigation.

Plaintiff is a subdivision of a Delaware corporation which maintains an office and manufacturing plant in Hot Springs, Arkansas where it is engaged in the manufacture and assembly of coin and currency handling equipment. Plaintiff employs some 400 persons at the plant, of whom some 300 are production and maintenance employees represented by the Union.

It is stipulated and undisputed that plaintiff is an industry affecting commerce within the meaning of Sections 2(7) and 301 of the LMRA, 29 U.S.C. §§ 152(7) and 185 and that the United Steelworkers of America, Lodge No. 6178, is a labor organization within the meaning of Section 2(5) of the LMRA, 29 U.S.C. § 152(5) which is engaged in representing or acting for employee members within the Western District of Arkansas.

Defendants Frankie Joe Russell, Clois D. Lishbrook, Margaret Sue Loudermill and Dewey D. Stiles are officers or agents of the Union and are residents within the Western District of Arkansas. The Union represents and acts for all of the hourly-rated, non-supervisory production and maintenance employees at the plaintiff's Hot Springs, Arkansas, plant. Substantially all of the employees represented by the Union are and have been members of the Union.

The Agreement of January 8, 1975, includes among its terms and provisions Article XXXIV, No-Strike No-Lockout, which provides in relevant part that:

> "Section 2. The Union agrees that there shall be no strikes, slow-ups, stoppages of work, sit-down strikes, refusals to handle merchandise, material or equipment or other interference with the operations of the Company during the term of this Agreement."

Article XV of the Agreement, Grievance Procedure, provides in relevant part that:

> "Section 1. Should any difference arise between the Company and the Union or its members employed by the Company as to the meaning, application or violation of the terms and provisions of this Agreement, there shall be no suspension or impeding of work on the part of the Union or lockout on the part of the Company on account of such differences—but an earnest effort will be made to settle such differences . . ." pursuant to procedures set forth in the remainder of said Article.

Article XV sets forth a set of procedures under which

any grievances of employees within the bargaining unit are made and processed through meetings between representatives of the Union and the Company. Should these meetings and discussions not be effective to resolve the differences of the parties as to the matters in controversy, then the Article provides that the dispute shall be referred to arbitration proceedings, as provided for thereinafter.

At a meeting in December, 1976, an incident is alleged to have occurred which led to the discharge of the president of the local Union, Frankie Joe Russell, and the suspension of two of the local's officers, Clois D. Lishbrook and Margaret Sue Loudermill, for 30 days. The Union filed grievances as to the discharge of Russell and the suspensions of the other two Union officers. Russell and the two suspended officers were the designated representatives of the Union to represent the Union at grievance hearings.

The Company requested that the Union negotiate at the next higher level, over the grievance committee of which Russell was a member, pursuant to their interpretation of Section 4 of Article XV of the Agreement, requesting that the conduct of Russell at the December meeting be investigated. An investigation was conducted and report made. A meeting was held, but the parties failed to resolve the issue. The Company requested that further grievance proceedings be conducted by the next highest Union official, which the Union declined to do.

The Company refused to engage in grievance proceedings with Mr. Russell as a Union representative and the Union refused to appoint another representative to meet with the Company, insisting that the Company bargain with Mr. Russell. Further grievance was filed as to the failure of the Company to abide by grievance procedures. Further grievances were filed, but due to the impasse as to the participation of Mr. Russell in the proceedings, the grievances were not processed as provided for in the Agreement.

In February, 1977, the Company determined that a series of six new work rules were desirable. The Union was made aware of the proposed rules, but again refused to meet and bargain with the Company without Russell being present as a representative.

The Company then placed the work rules in effect. Among the rules were two rules which required employees to "log in" and "log out" when leaving or returning to their assigned place of work. Clois D. Lishbrook, the senior local officer of the Union, in the absence of Mr. Russell, informed Company representatives that she did not intend to comply with the new work rules; a grievance as to the adoption of the work rules was filed, and she made statements from which the inference might be drawn that the Union would back those employees who chose not to comply with the new rules.

Under procedures followed with reference to the enforcement of the work rules, employees in violation would first be warned verbally, upon a second failure to comply a written warning would be delivered, a third failure to comply resulted in further verbal warnings and a warning that the employee would be suspended on the next violation. Subsequent failure to comply only then resulted in suspension of the employee.

Within four working days after the new rules were placed in effect 138 employees had been suspended for violation of the work rules. Production had dropped to 30% of normal. The Court finds that the members of the local Union did thereby engage in concerted activity calculated to slow up and impede production at the plant and that this activity was initiated and encouraged by the defendant Union and its officers and employees by reason of the differences then existing between the Union and the Company having to do with interpretation of the Collective Bargaining and operations and procedures thereunder. The Court concludes that

this is violative of the provisions of Articles XV and XXXIV of the Agreement.

Company officials met with Union representatives at Washington, D.C., without resolving the differences. Company representatives then offered to proceed immediately to arbitration on the grievance concerning Mr. Russell's discharge, which appears to be the reason that the other differences and grievances have not been resolved in normal grievance procedures. The Union refused.

By telegram dated March 18, 1977, the Company requested that the intermediate grievance steps be waived and that all grievances concerning the discharge and suspensions arising in December, 1976, the implementation of the work rules and the disciplinary actions taken pursuant thereto, be submitted to arbitration immediately. The Union responded that these matters were the subject of proceedings before the NLRB.

The Court finds and concludes that the Company and the Union have reached an obvious impasse in their relations under the Collective Bargaining Agreement. It is evident that the grievance procedures as provided for therein are not effective under the existing circumstances to resolve the differences between the parties. The Agreement supplies the remedy, arbitration.

Some 217 grievances are shown to be pending and each is found to be at least arguably arbitrable. None is specifically excluded from arbitration by the agreement.

Defendants contend that the grievances are not subject to arbitration by reason of the fact that the grievance procedures specified in steps one, two and three of the Agreement have not been accomplished. It is readily concluded that the steps preceding arbitration have not been accomplished by reason of the basic dispute between the parties, whether Mr. Russell shall attend the meetings as representative of the Union. In John Wiley & Sons v. Liv-

ingston, 376 U.S. 543 (1964), the Supreme Court, at page 555, et seq., made plain that:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.
>
> • • •
>
> . . . we think it best accords with the usual purposes of an arbitration clause and with the policy behind federal labor law to regard procedural disagreements not as separate disputes but as aspects of the dispute which called the grievance procedures into play."

The objections of defendants based upon lack of "procedural arbitrability" are not well taken. Both the subject matter of the grievances and the differing interpretations of the requirements of the Collective Bargaining Agreement are, in the opinion of this Court, proper subjects of arbitration.

It is undisputed that the disputes between the parties have resulted in severe disruptions in production at the Company's Hot Springs plant. The record establishes that continued interference with production will result in lower output, delays in deliveries, and may result in failures to meet existing contracts and may cause interference with the securing of future contracts. The Court, therefore, finds that the breaches of the "no-strike" provisions of the Agreement, as hereinabove, set out, will cause irreparable injury to the Company, if permitted to continue until the disputes between the Company and the Union are finally resolved.

Plaintiff would obviously suffer more from a denial of the injunctive relief requested than would defendants from its issuance. Any loss of contracts or sales due to slow ups, sit downs or other concerted activity on the part of the defendants calculated to coerce plaintiff to submit to defendants on the disputes would be in clear violation of the

requirements of the Collective Bargaining Agreement and could only result in loss not only to the Company, but to the employees as well.

The Court concludes from the evidence adduced at the hearing that there is a substantial probability of success on the merits of plaintiff's complaint in this litigation.

The Court, therefore, finds that all the conditions and requirements of Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970), and Valmac Industries v. Food Handlers Local 425, 519 F.2d 263 (1975), have been met, and that the injunctive relief prayed for should be granted.

Such injunction will, however, be conditioned upon the submission of the pending grievances to arbitration forthwith. Procedures for selection of the arbitrator are provided in the Agreement, and will be instituted within 20 days from the issuance of the Order of this Court. Defendant Union will, within the 20 day period, determine which of the outstanding grievances it wishes to submit to arbitration and furnish such list to Plaintiff, with a copy to be filed with the Clerk of this Court. All grievances not so listed shall be deemed abandoned.

An Order will be entered in accordance with this Memorandum Opinion.

Order

Pursuant to the findings of fact and conclusions of law contained in the Memorandum Opinion filed herein on this date,

It Is Considered and Ordered that the defendants, United Steelworkers of America, AFL-CIO, and its Local No. 6178, Frankie Joe Russell, Clois D. Lishbrook, Margaret Sue Loudermill and Dewey D. Stiles, and their officers, privies, agents, employees, servants, successors, assigns, members and any other person or persons in active concert or participation with them, and each of them, are hereby restrained and enjoined from engaging in, inducing, encouraging or in any way causing, assisting, aiding, advising or in any way encouraging or assisting any strike, slow-up, stoppage of work, sit-down strike, refusal to handle merchandise, material or equipment, or other interference with the operations of the Hot Springs, Arkansas plant of National Rejectors Industries, Division of UMC Industries, Inc., and specifically including but not limited to, refusals to abide by the work rules existing at said plant.

It is Further Ordered that plaintiff shall forthwith, and within 20 days of the date of entry of this Order, request that a panel of arbitrators be provided as set out in Article XV of the Collective Bargaining Agreement and expressly agree to arbitrate such grievances as shall be designated by defendant Union. Defendant Union is ordered to determine within 20 days of the date of entry of this Order which of the now outstanding grievances it wishes to pursue to arbitration, to submit such list to plaintiff and to file a copy thereof with the Clerk of this Court within said 20 days. All grievances not listed for submission to arbitration will be deemed abandoned.

Defendants' motion filed herein, styled Motion to Dismiss, is denied for the reasons stated in the Memorandum Opinion of the Court filed herein this date.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-445

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, ET AL.,

Petitioners,

v.

NATIONAL REJECTORS INDUSTRIES,
ETC.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including December 28, 1977.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 21st
day of November, 1977.

Supreme Court, U. S.
FILED
FEB 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-928

OCTOBER TERM, 1977

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC, *et al.*,
Petitioners,

v.

NATIONAL REJECTORS INDUSTRIES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CONSTANGY, BROOKS & SMITH
LOVIC A. BROOKS, JR.
EDWARD KATZE
CHARLES A. EDWARDS
Attorneys for Respondent

1900 Peachtree Center Building
230 Peachtree Street, N.W.
Atlanta, Georgia 30303

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Question Presented	1
Statutory Provisions and Rules Involved	1
Statement of the Case	2
Reasons for Denial of the Writ	7
I. The Injunction Was Properly Issued	7
II. "Unfair Labor Practice" Strikes Are Not Not an Exception to the Boys Markets Rationale	12
Conclusion	16

Table of Authorities

Cases:

Anheuser-Busch, Inc. v. Teamsters Local 633, 511 F.2d 1097 (1st Cir.), cert. denied, 423 U.S. 875 (1975) ..9, 10

Boys Markets, Inc. v. Retail Clerks Int'l U., 398 U.S. 235 (1970) 7, 11, 12, 13

Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397 (1976) 7, 10, 11

Collyer Insulated Wire, 192 N.L.R.B. 150 (1971) 14

Lodge 12, Machinists v. Cameron Iron Works, Inc., 257 F.2d 467 (5th Cir.), cert. denied, 358 U.S. 880 (1958) 15, 17

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1976) ..12, 13

Motor Coach v. Lockridge, 403 U.S. 274 (1971) 12, 13

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 12, 13

Smith v. Evening News Ass'n, 371 U.S. 195 (1962) 12

Southwestern Bell Telephone Co. v. Communications Workers of America, Local 6222, 343 F.Supp. 1165 (S.D. Tex. 1972) 13, 14

William E. Arnold Co. v. Carpenters, 417 U.S. 12 (1974) 12, 14

Statutes and Rules:

§ 301, Labor-Management Relations Act, 29 U.S.C. § 185 ..... 12, 14

Sup.Ct.Rule 19 7

Other Authorities:

Spelfogel, Wildcat Strikes, Minority Concerted Activity—Discipline, Damage Suits and Injunctions, 24 LAB. L. J. 592 (1973) 14

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-928

OCTOBER TERM, 1977

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, *et al.*,
Petitioners,

v.

NATIONAL REJECTORS INDUSTRIES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTION PRESENTED

Is the determination below one which requires or justifies the exercise by this Court of its discretionary review powers?

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 19. Rules of the Supreme Court of The United States:

Rule 19. Considerations Governing Review on Certiorari.

1. A preview on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where

there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or had decided an important state or territorial question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect to petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

All other pertinent statutes and rules are reproduced in the Petition for Certiorari.

STATEMENT OF THE CASE

Respondent National Rejectors Industries (NRI) agrees with the first paragraph of petitioners' "Statement of the Case." Beyond that point, however, petitioners have presented an argumentative version of the facts, including matters not of record in the proceedings below, which constrain NRI to provide the

Court with a statement of the case which is more accurate, more objective and contains citations to the record.[1]

On October 15, 1976, petitioner Frankie Joe Russell tore up a stack of label orders which had been placed at his work station. [T. 71.] For this insubordinate act, Russell was given a written warning. [T. 71.] Russell, the president of petitioner Local 6178, promised NRI's Director of Personnel and Industrial Relations that if the warning were not removed from Russell's personnel file the Company would be "swamped" with so many grievances that the plant would be shut down. [T. 71-72.] The warning remained in Russell's file, whereupon NRI began receiving a large number of "harassment-type grievances" as a result of the Union's "shopping for grievances wherever possible." [T. 37.]

On November 22, 1976, NRI requested that an investigation be held pursuant to Article XV, Section 4 of the collective bargaining agreement between NRI and the petitioner Unions.[2] [T. 45, 50, 64-66, 74-77.] On December 6, 1976, the results of that investigation were reported to the Company. [T. 75-77.] NRI then requested that Russell be removed from grievance handling, with the Union's designated Step 3 representative proceeding with the pending grievances. [T. 65-66.]

---

[1] Respondent notes that in the Court of Appeals the Union was satisfied with "most of" the trial court's findings of fact. [Appellant's Brief, p. 4.] Record references herein are to the Transcript of Hearing in the trial court on March 29, 1977, cited as "T. . . .," and to exhibits introduced at that hearing or theretofore.

[2] "The Company and Union agree to meet in good faith and make as honest an effort to settle grievances at the lowest level of the grievance procedure as is possible. Representatives of the parties shall meet as equals and present and discuss facts of the grievances in a business-like, orderly manner. *Should the actions of the representatives of either party be such that the integrity of the grievance procedure is threatened, then the authorized 3rd step representative of the Company or Union shall notify the opposite party who shall investigate and report back the results of such investigation and the corrective action taken, if any.* If such report is not satisfactory or

On December 15, at a meeting between NRI management representatives, Union officers and some other employees, Russell threatened bodily harm to NRI's Plant Manager. [T. 73-74.] As a result of that altercation, Russell was suspended for purpose of discharge and two other Union officers received thirty-day suspensions. Russell's suspension was converted to a discharge on December 20. Grievances were filed by the Union challenging the discharge and suspensions. [Plaintiff's Exhibit 2.]

Grievances continued to be filed but, due to the Union's lack of willingness either to comply with Article XV, Section 4 or to advance the Russell discharge grievance to arbitration, no meetings were held under the contractual grievance procedure. [T. 46-47] The failure to conduct meetings with Russell present was also the subject of a grievance. [Plaintiff's Exhibit 2.]

In late January, the Union filed unfair labor practice charges with the National Labor Relations Board concerning the Russell discharge, the two suspensions and the failure to meet. [Affidavit of petitioner Stiles in support of Motion to Dismiss, Exhibit A.] After these charges were filed, the Union refused to discuss grievance handling on the basis that such problems were "a matter of litigation." [T. 34-82]

In early February, 1977, faced with a situation in which employees, instead of working, were wandering about the plant,

---

if the facts are in dispute either party may request a meeting for the purpose of determining the facts and settling the issue. If the issue is not satisfactorily settled at this meeting either party may request the other to take such action as may be appropriate and necessary to correct the problem. In this event, *the grievance machinery shall continue to function with the next highest officials of the Company and Union conducting the meetings to insure the processing of grievances in a timely manner until such time as both parties are agreed that normal operation of the grievance procedure can be resumed.*" (Emphasis supplied.)

playing checkers, reading newspapers and working crossword puzzles, NRI proposed a productivity program and urged the Union to comment on its contents. [T. 68-69] The Union refused to meet concerning the program without having Russell present, while the Company refused to confer with Russell in attendance. [T. 52-55, 70] The productivity program was then explained to employees in letters and in group meetings. [T. 53] Among the new procedures contained in the program were work rules designed to record employees' time away from their work stations by use of a logging system. [T. 58]

During the group meetings, petitioner Lishbrook, Vice-President of Local 6178, stated her defiance of the productivity program and urged other employees to violate the procedures then under discussion. [T. 69]. Several days thereafter, the productivity program was put into effect; a grievance was filed by the Union regarding the implementation of the program. [Plaintiff's Exhibit 2.]

In the three work days following the implementation of the productivity program, more than half of the bargaining unit employees deliberately and repeatedly violated the logging procedures. [T. 67-68] Three-day suspensions for insubordinate conduct was imposed on those employees with as many as five violations. [T. 68]. The disruption caused by these employees resulted in a reduction in the Company's productivity to thirty per cent. [T. 59.]

The Company then urged the Union once more to arbitrate certain key grievances—the Russell discharge, the two suspensions, the grievance procedure dispute, and the productivity program—while the logging procedure would be held in abeyance. [T. 34-37] The Union refused, and this action was filed seeking injunctive relief to enforce the no-strike clause of the collective bargaining agreement and to compel the Union to

arbitrate or abandon the 217 grievances then pending. [T. 34-37.]

The trial court granted the requested preliminary injunction (95 LRRM 2145), whereupon the Union appealed. The United States Court of Appeals for the Eighth Circuit affirmed the trial court's decision in all respects, 562 F.2d 1069. Shortly thereafter, the Union filed the petition here *sub judice*.

REASONS FOR DENIAL OF THE WRIT

Both at trial and on appeal the Union advanced two arguments: (1) that the subject matter of this case fell within exclusive N.L.R.B. jurisdiction, and (2) that issuance of an injunction was violative of the Norris-LaGuardia Act. Having twice failed on both contentions, the Union now brings this Court two new arguments which it contends to be "important issues which have not been but should be decided by this Court." NRI respectfully submits, however, that the Union's strained interpretations of decisions of this Court are, while ingeniously contrived, no more than a transparent effort to create a "cert-worthy" issue where none exists. Simply stated, the standard of Supreme Court Rule 19(1)(b) has not been met and the petition should be denied.

1. The Injunction Was Properly Issued.

The keystone of the Union's argument is that employee concerted activity cannot be enjoined unless that concerted activity itself "threatens the arbitral process." Such a contention is not supported by either this Court's decisions in *Boys Markets*[3] and *Buffalo Forge*[4] or the uncontested facts contained in the record herein.

Proceeding first from the facts, it is glaringly apparent that NRI employees, counseled and supported by the Union and its agents, intentionally and deliberately interfered with the operations of the Company in violation of the obligations of Article

---

[3] Boys Markets, Inc. v. Retail Clerks Int'l U., 398 U.S. 235 (1970).

[4] Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397 (1976).

XXXIV, Section 2 of the collective bargaining agreement.[5] The sophistic distinction advanced by the Union—that employees who deliberately violated the work rules by leaving their work stations without making log entries were not engaged in conduct which "jeopardized production and hence threatened the arbitral process"—is without any basis in logic.

Witness the Union's own language:

> [P]lainly work rules come in all varieties, from the trivial to the vital, and not every such breach—or every concerted such breach—will threaten the arbitral process . . . [T]he violations [of the work rule] in no way impaired production . . . Production was slowed solely because of NRI's self-destructive response to the concerted activity—mass suspensions—not by the activity itself . . . The effect of this behavior was to exert economic pressure on petitioners to concede on an important arbitrable issue: *viz*, whether NRI could refuse to process grievances so long as the local president was a member of the grievance committee.
>
> [Petition, pp. 13-14 and n. 4.]

Then, in a glaring misstatement, the Union plunges into *non sequitur:* "That this was indeed the Company's purpose was revealed when four days after promulgating the work rules the Company offered to cease enforcing them if USWA would concede on this issue." [*Ibid.*]

In fact, two months before the work rules were implemented the Union had filed a grievance challenging NRI's invocation and interpretation of Article XV, Section 4 of the collective

---

[5] "The Union agrees that there shall be no strikes, slow-ups, stoppages of work, sit-down strikes, refusals to handle merchandise, material or equipment or other interference with the operations of the Company during the term of this Agreement."

bargaining agreement. This arbitrable grievance, effectively stood in the path of any discussion between the Company and the Union. Efforts to continue the grievance procedure were rebuffed by the Union due to the pendency of the NLRB charges; entreaties to arbitrate these key issues to allow the grievance procedure to resume its necessary functions were rejected. Then, faced with industrial anarchy, the Company made a last-ditch effort to sustain productivity only to be met with massive resistance on the part of the Union and its employee-members. The Company did *not* demand any "concession" of the Union. Instead, NRI recognized the stalemate created by the parties' inability to agree on the meaning of Article XV, Section 4 and requested the Union to allow an impartial third party to break the logjam. The offer to suspend enforcement of the work rules was designed to spur the Union into an agreement to resolve the crucial issues which had not only threatened but had totally destroyed the arbitral process and the preliminary steps of that process.

The Union also disingenuously overlooks the trial court's initial request that the Company extend its suspension of the work rules until the preliminary injunction hearing, as well as the fact that a new outbreak of mass violations occurred during the week prior to oral argument in the Court of Appeals, thereby requiring an emergency motion to be filed in that Court.

The trial court's injunction directed petitioners and employees under their direction and control to refrain from violations of the contractual no-strike clause, including interference with the operations of the Company, until such time as impediments to normal grievance processing could be removed through arbitration. Obviously stung by this judicial direction that the Union allow the Company to continue production, the Union now casts reason aside in an attempted comparison of the facts *sub judice* with those involved in ***Anheuser-Busch, Inc. v. Teamsters Local 633***, 511 F.2d 1097 (1st Cir.), *cert. denied*, 423 U.S. 875 (1975).

Anheuser-Busch was discovered by the Union on the eve of oral argument in the Eighth Circuit. Although clearly inapposite, that decision was there strenuously argued by the Union; the Eighth Circuit majority flatly rejected the Union's belated reliance on *Anheuser-Busch*, 562 F.2d at 1077, stating:

> We see no analogy between the facts presented in Anheuser-Busch and those in the instant case. Here, NRI did not bring about the disruption itself by insisting upon the enforcement minor work rules. The company was willing to, and did in fact suspend enforcement of its rules pending resolution of the underlying dispute through arbitration. In addition, the injury to NRI threatened by continued disruptions of employees at the Hot Spring plant, even in the absence of work rules, is clearly greater than the potential harm of having one's employees present an unsightly appearance to visitors at the plant.

As the Eighth Circuit pointed out, the *Anheuser-Busch* decision merely concluded that under the facts there presented, "there was not a showing of potential injury adequate to support relief under general equitable principles," while explaining that "in another case, there might be an adequate showing that employee disregard of work rules was seriously undermining an employer's ability to conduct his business." 562 F.2d at 1078, *quoting from, Anheuser-Busch, supra,* at 1100.

Thus, even if there were a requirement that the underlying dispute "threaten the arbitral process" in order to be subject to injunctive relief, that requirement has been satisfied in this case. Additionally, however, the contorted interpretation of this Court's decision in *Buffalo Forge Co. v. Steelworkers,* 428 U.S. 397 (1976) cannot be justified. While it is true that this Court stated (428 U.S. at 407) that "[s]triking over an arbitrable dispute would interfere with and frustrate the arbitrable processes by which the parties had chosen to settle the dispute," petitioners' partial quotation from that decision is misleading. This

Court made it clear that *any* strike over an arbitrable dispute is enjoinable where "[t]he quid pro quo for the employer's promise to arbitrate was the Union's obligation not to strike over issues that were subject to the arbitration machinery . . . Otherwise, the employer would be deprived of his bargain and the policy of the labor statutes to implement private resolution of disputes in a manner agreed upon would seriously suffer." *Ibid.* This Court went on to state that the reason for refusal to apply the *Boys Markets* rationale in *Buffalo Forge* was that the District Court in that case found "that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract." *Ibid.* In this case, however, the employees' refusal to log in and log out resulted from the employer's promulgation and implementation of a productivity program which included work rules, which work rules had been grieved by the Union. Thus, the violation of the no-strike clause by the employees was patently "over a dispute subject to arbitration." This being so, this Court's explanation of *Boys Markets* in *Buffalo Forge,* 428 U.S. at 411, is controlling: an injunction in this case pending arbitration was "esséntial to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract."

Petitioners would apparently require the district courts, faced with a request for a *Boys Markets* injunction, to engage in lengthy hearings on the merits. This, however, is explicity forbidden by *Buffalo Forge*: "[T]his would still involve hearings, findings, and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted." Hence, neither *Boys Markets* nor *Buffalo Forge* mandate the result urged by petitioners, and the petition should be denied.

II. "Unfair Labor Practice" Strikes Are Not an Exception to the Boys Markets Rationale.

The Union then turns to an argument that if the employees' refusal to comply with the work rules was a response to unfair labor practices committed by the Company, injunctive relief would be forbidden by *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1976). Such an argument is entirely frivolous. First, a federal district court is without jurisdiction to determine whether conduct constitutes an unfair labor practice proscribed by the National Labor Relations Act. As this Court ruled in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and reiterated in *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962), "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301." As this Court further observed in *William E. Arnold Co. v. Carpenters*, 417 U.S. 12, 16 (1974), "This exception [*to Garmon*] was explicitly reaffirmed in *Motor Coach v. Lockridge*, 403 U.S. 274 (1971). It was fashioned because the history of Section 301 reveals that 'Congress deliberately chose to leave the enforcement of collective agreements to the usual processes of law' . . . Thus we have said that *Garmon* is 'not relevant' to actions within the purview of Section 301 . . ."

Consequently, petitioners would have this Court order that, in any case in which the Union alleged that unfair labor practices had been committed, the trial court would be precluded from enforcing the no-strike clause of the collective bargaining agreement and ordering arbitration until either the court or the NLRB had determined whether or not the conduct in question constituted an unfair labor practice. Were this so, the *Boys Markets* remedy would be deprived of any utility whatsoever, since injunctive relief to preserve industrial peace could be thwarted by the filing of an unfair labor practice charge.

Particularly incongruous is the penultimate paragraph of the Petition for Certiorari, wherein petitioners state, "during the period that collective bargaining agreements are in effect [unfair labor practice] strikes may occur more frequently than economic strikes, sympathy strikes or *strikes designed solely to enforce the contract*." (Petition, p. 22, emphasis supplied.) But the Union grieved the implementation of the work rules in addition to filing unfair labor practice charges. The conclusion to be drawn from the Union's argument seems to be that, although the grievance was filed, that grievance was not to be taken seriously; instead, only the unfair labor practice charge, which is in all respects identical to the grievance, is to be considered by the court in determining whether the wholesale violations of the work rule and the resultant disruption of Company operations may be enjoined.

But as this Court stated in *Boys Markets, Inc. v. Retail Clerks Int'l U.*, 398 U.S. 235, 249 (1970), "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate."

Finally, it is significant that the Union has been unable to find *any* authority under *Boys Markets* for the proposition it advances. This issue was not articulated in either the Courts below, and, unsupported by a scintilla of judicial authority, should not be given cognizance here. Indeed, Respondent has found only one case which expressly deals with the *Boys Markets* injunction in an unfair labor practice context: In *Southwestern Bell Telephone Co. v. Communications Workers of America, Local 6222*, 343 F.Supp. 1165, 1172 (S.D.Tex. 1972), the trial court, relying upon *Mastro Plastics, Garmon, Lockridge* and *Boys Markets*, and pointing to the NLRB's deferral pro-

cedures established in *Collyer Insulated Wire*, 192 NLRB 150 (1971), stated:

> The only way out of the dilemma posed by *Boys Markets, Garmon* and *Lockridge*, is to go even further in favor of arbitration. Therefore, while assent to no strike-arbitration clauses is not necessarily a waiver of access to the Board over an unfair labor practice, it can be, and the inclusion of such clauses raises a presumption that unfair labor practice disputes, like any other disputes, are arbitrable unless otherwise specified. Having reached this conclusion, conduct which might be otherwise protected by *Garmon* and *Lockridge* is subject to the power of federal courts under 29 U.S.C. § 185(a) to enforce collective agreements and protect the arbitration process. The union's argument that the strike is shielded from injunctive relief because it was called in response to an unfair labor practice is rejected. (Citations omitted).

Judge Seals then noted:

> It must be recognized that the result adopted here means that from time to time (perhaps even here) federal courts will be enjoining lawful activity. However the determination of "lawfulness" and the right of the parties to resort to unilateral action must await the outcome of arbitration. Recognizing the potential for injustice here it is incumbent upon the courts to fashion their orders to protect the parties pending arbitration and to protect the integrity of the arbitration process.

343 F.Supp. at 1172, n. 9. *And* see, "Wildcat Strikes, Minority Concerted Activity—Discipline, Damage Suits and Injunctions," 24 Lab. L.J. 592, 602 (1973).

It should also be remembered that this Court's decision in *Arnold, supra*, arose out of a state court's injunction against a

contract violation which was also argued to be violative of 29 U.S.C. § 158(b)(4)(i)(D). Moreover, as the Fifth Circuit explained in *Lodge 12, Machinists v. Cameron Iron Works, Inc.*, 257 F.2d 467, 474 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958):

> Certainly, if an otherwise arbitrable controversy happens also to be an unfair labor practice, the parties should not be forced to abandon their contract right and to relegated 'to the slow and creaking procedure which, like a wounded snake, has dragged its slow length along, sans bargaining, sans labor peace, sans everything but pride of opinion, illtemper and frustration.' . . . Enforcement of a contract to arbitrate grievances is different from an adjudication of an unfair labor practice by the National Labor Relations Board . . . [the Lincoln Mills case] did establish two broad principles: first, that the United States district courts have the unequivocal statutory power to decree specific performance of collective bargaining contracts to arbitrate; and, second that private arbitration in the labor management field is to be afforded broad liberties.

Thus where the underlying dispute focuses upon interpretation of a contract clause designed to preserve the integrity of the grievance procedure, it is respectfully submitted that the trial court was correct in enjoining breaches of the no-strike clause and in ordering that the grievances be arbitrated. Accordingly, Petitioners' second basis for issuance of a writ of certiorari is also without merit.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

CONSTANGY, BROOKS & SMITH
LOVIC A. BROOKS, JR.
EDWARD KATZE
CHARLES A. EDWARDS
Attorneys for Respondent
National Rejectors Industries

1900 Peachtree Center Building
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
404/525-8622